

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
)	Docket No. 03-0323
Petition to Determine Adjustments to UNE Loop)	
Rates Pursuant to Section 13-408 of the)	
Illinois Public Utilities Act)	

**SBC ILLINOIS' OPPOSITION TO Z-TEL/COVAD
EMERGENCY MOTION FOR CONTINUANCE OF
BRIEFING SCHEDULE AND REQUEST FOR DEPOSITIONS**

Illinois Bell Telephone Company ("SBC Illinois" or the "Company"), by its attorneys, hereby files its Opposition to Z-Tel Communications, Inc.'s and Covad Communication Company's Emergency Motion for Continuance of Briefing Schedule and Request that SBC Produce Witnesses for Deposition on Less Than 14 Day's Notice ("Z-Tel/Covad Motion"). The Motion should be denied because it ignores the statutory deadline applicable to this proceeding and would not be justified under the Commission's Rules of Practice in any event.

1. On May 14, 2003, the Administrative Law Judges convened a status hearing to determine a schedule for this proceeding. The rate adjustments required by new Section 13-408 must go into effect within 30 days of its enactment (i.e., by June 9, 2003). At the status hearing, the Commission Staff proposed a schedule which would permit the Commission to reach a decision by that date. Although counsel for Z-Tel and Covad objected on the grounds that they wanted more time to conduct discovery, prepare their positions and cross-examine witnesses, at no time did they actually present an alternative schedule for the consideration of the Administrative Law Judges or the parties. In adopting the schedule in this proceeding, the Administrative Law Judges made every effort to balance the interests of all parties within the constraints of the 30-day period established by the General Assembly.

2. Dissatisfied with the schedule, Z-Tel/Covad filed an Emergency Petition for Interlocutory Review, complaining that the schedule does not allow adequate time for discovery, cross-examination and hearings. SBC Illinois' Opposition to that Petition, filed simultaneously with its Opposition to this Motion, explains that Z-Tel/Covad still has presented no viable alternative schedule to the Commission and that their Petition should be denied.

3. In this Motion, Z-Tel/Covad again claim that they need additional time to conduct discovery and, instead of cross-examination, to take depositions. Although SBC Illinois will address their request on its merits below, it is important to recognize at the outset that Z-Tel/Covad are continuing to ignore the fact that any schedule in this proceeding must fit within the 30-day statutory deadline. Having failed to present an alternative schedule that would accommodate cross-examination either at the May 14, 2003 status hearing or in their Petition for Interlocutory Review, SBC Illinois is at a loss to understand how Z-Tel/Covad can seriously propose in this Motion an even more time consuming process – i.e., the deposition of *seven* witnesses. In fact, Z-Tel/Covad do not even try. They simply request that the Commission “. . . continue the current schedule until after the completion of the depositions.” This willful refusal to even acknowledge the existence of the 30-day statutory deadline, much less present a request that can be accommodated within these constraints, is inexplicable.

4. In substance, Z-Tel/Covad's Motion is another Petition for Interlocutory Review of the schedule adopted in this proceeding. As the Motion acknowledges, neither additional time for discovery nor depositions are provided for in the existing schedule. As a practical matter, the Z-Tel/Covad request cannot be granted without modifying the schedule. Therefore, Z-Tel/Covad's Motion should be treated as a second Petition for Interlocutory Review of the

schedule under a different label and should be denied along with the Petition for Interlocutory Review.

5. Even on its merits, the Z-Tel/Covad Motion should be rejected. Z-Tel/Covad's claim that they need more time to conduct discovery and review the AT&T data responses in Docket NO. 02-0864 is largely contrived. (Z-Tel/Covad Motion at 2). As part of the CLEC Coalition in Docket No. 02-0864, Z-Tel/Covad served hundreds of data requests on SBC Illinois regarding these same cost studies and methodologies, and they acknowledge that they "... received SBC's responses . . ." (*Id.*).¹ AT&T's data requests in that proceeding – which were numerous – were served on all parties, including Z-Tel/Covad. SBC Illinois served its responses to these AT&T data requests – which were voluminous – on lead counsel for the Coalition in Docket No. 02-0864 who had requested copies from SBC Illinois in the name of the Coalition. If the CLEC Coalition's lead counsel was not, in turn, providing copies of these data request responses to the other Coalition members, Z-Tel/Covad could have contacted SBC Illinois at any time to request that the AT&T data request responses be served on them directly – but they did not do so. It is more than passing strange that Z-Tel/Covad have only now developed a passionate interest in data request responses that have been available for months. Furthermore, undersigned counsel contacted Z-Tel/Covad upon receipt of their request, suggesting that they might want to limit their request to those AT&T data request responses that were still relevant to this proceeding, so as to avoid being inundated with useless information.² Z-Tel/Covad cursorily

¹ SBC Illinois' Opposition to Z-Tel/Covad's Petition for Interlocutory Review filed simultaneously with this Opposition provides further background on the CLEC Coalition and Z-Tel/Covad's involvement in Docket No. 02-0864.

² Much of the AT&T discovery has no bearing on any issue in this proceeding. For example, AT&T submitted data requests regarding SBC Illinois' nonrecurring cost studies (which are not at issue here), inputs in the Docket No. 02-0864 cost studies other than depreciation and fill (e.g., investment costs in the LoopCAT model, Annual Charge Factors, and the Shared and Common Factor), and information that AT&T used to develop alternative methodologies altogether.

rejected this suggestion, demanding that SBC Illinois send them all 142 megabytes of data.

Having received precisely what they asked for, Z-Tel/Covad can hardly be heard to complain.

6. With respect to Z-Tel/Covad's own data requests in this proceeding, SBC Illinois has responded extremely promptly, generally within one business day. In their Motion, Z-Tel/Covad further contend that SBC Illinois has relied on cost studies and information from the original TELRIC docket (Docket No. 96-0486) and that these studies have not been provided. (Z-Tel/Covad Motion at 2). They are incorrect. As required by Section 13-408, SBC Illinois used the cost models and methodologies from Docket No. 02-0864 to develop an adjustment factor which was then applied to the *loop rates* which were approved in Docket No. 96-0486. The Docket No. 96-0486 cost models were not used in any way in this process. Therefore, there is no "material" which SBC Illinois has not produced to Z-Tel/Covad.

7. Z-Tel/Covad's request that SBC Illinois be compelled to produce seven named individuals for depositions is an extraordinary remedy that is contrary to the Commission's Rules of Practice, contrary to long-established practice in Commission proceedings, contrary to the schedule in this proceeding and would be prejudicial to SBC Illinois.

8. The Commission's Rules of Practice strongly discourage the use of depositions in Commission proceedings. The Commission's Rules of Practice provide as follows:

"Formal discovery by means such as depositions and subpoenas is discouraged unless less formal procedures have proved to be unsuccessful. It is the policy of the Commission not to permit requests for information, depositions, or other discovery whose primary effect is harassment or which will delay the proceeding in a manner which prejudices any party or the Commission, or which will disrupt the proceeding." 83 Ill. Admin. Code § 200.340 (emphasis added).

The Commission's subpoena rule also requires a showing that the information to be elicited from the identified witnesses cannot be obtained through other means:

“Requests for subpoenas may be made by any party and shall be made in the form of a verified written application. Such application shall incorporate a showing that such subpoena is *reasonably required to obtain information that cannot reasonably be obtained through requests for information or other discovery* and shall contain the name, address and telephone of the witness to be subpoenaed, the docket number of the proceeding and the date, time and location of the hearing or deposition at which it is desired that the witness appear. An application for a subpoena duces tecum shall specify the books, records or other documents to be produced and the material or relevant facts to be proved by them.” 83 Ill. Admin. Code § 200.380(c) (emphasis added).

Z-Tel/Covad has neither sought nor obtained a subpoena for these witnesses under the Commission’s Rules of Practice. Moreover, they have not satisfied any of the requirements of a subpoena request under Section 200.380. Z-Tel/Covad do not allege that the information Z-Tel/Covad are seeking “cannot reasonably be obtained through requests for information or other discovery,” they do not identify the subject matter on which they wish to question these witnesses, and they do not explain how that subject matter relates to the requirements of Section 13-408. Instead, Z-Tel/Covad’s whole showing in this regard is the bare statement that, upon information and belief, “. . . each of these witnesses holds opinions relating to costs for unbundled network elements provided by SBC.” (Z-Tel/Covad Motion at 1, 3). This is no showing at all.

9. In fact, Z-Tel/Covad do not need to depose these witnesses. With the exception of Mr. Fete, the other six named individuals were witnesses in Docket No. 02-0864 and they prefiled extensive direct testimony in support of SBC Illinois’ UNE rate proposal in that proceeding. All parties had ample opportunity to serve data requests on these individuals over a four-month period. SBC Illinois has made clear to the parties in this docket that they may treat information provided to them in Docket No. 02-0864 as if it had been provided in this proceeding, subject to any relevancy objections SBC Illinois might raise. If Z-Tel/Covad have questions that were not asked in Docket No. 02-0864, they have only themselves to blame. With

respect to any new issues that might have been prompted by Mr. Smallwood's affidavit in this proceeding, Z-Tel/Covad have directed no specific data requests in this docket to him.

Therefore, they did not exhaust informal means of discovery, as required by Section 200.340 of the Rules, and have not justified the use of depositions.

10. Furthermore, the Docket No. 02-0864 proceeding was much broader in scope than this proceeding and most of the testimony (and the witnesses) are not relevant to the narrow analysis and adjustments required by Section 13-408. The subject matter of the witnesses' testimony other than Mr. Fete and Mr. Smallwood was as follows:

- Michael Silver developed proposed UNE rates by applying the Shared and Common factor developed by Mr. Barch to the TELRIC studies presented by other witnesses. In this case, SBC Illinois is not developing UNE rates based on the TELRIC studies presented in that proceeding. It is using the Docket No. 02-0864 models and methodologies to develop an adjustment factor that is then applied to SBC Illinois' existing UNE loop rates that were approved by the Commission in Docket No. 96-0486. Therefore, Mr. Silver's testimony is not relevant to any issue this proceeding.
- William Avera is an outside expert witness who supported the cost of equity that was used in SBC Illinois' updated UNE loop studies in Docket No. 02-0864. Since SBC Illinois is adjusting the UNE rates that were approved in Docket No. 96-0486 only for fill and depreciation, by definition it is not changing the cost of equity that the Commission approved in that docket. Therefore, Dr. Avera's testimony is not relevant to any issue in this proceeding.
- Lawrence Vanston is an outside expert witness who supported the economic lives SBC Illinois used in its updated UNE cost studies (*i.e.*, the lives used for financial reporting

purposes) as being appropriate in light of technology trends. Section 13-408 reflects a legislative determination that the economic lives used for financial reporting purposes are appropriate for TELRIC costing purposes. Therefore, Mr. Vanston's testimony is not relevant to any issue in this proceeding.

- David Barch presented SBC Illinois' updated Shared and Common factor and updated Annual Charge Factors ("ACF"). Since SBC Illinois is adjusting the UNE rates that were approved in Docket No. 96-0486 only for fill and depreciation, by definition it is not changing the Shared and Common factor or the ACF factors approved by the Commission in that proceeding. Therefore, Mr. Barch's testimony is not relevant to any issue in this proceeding.
- Randall White described SBC Illinois' outside plant engineering practices and supported the use of fill factors based on actual usage as being the best projection of actual total usage in accordance with federal requirements. Section 13-408 makes a legislative determination that fill factors based on actual total usage are appropriate for TELRIC costing purposes. Therefore, Mr. White's testimony is not relevant to any issue in this proceeding.

11. Finally, grant of Z-Tel/Covad's request for depositions is not practicable and would be prejudicial to SBC Illinois, contrary to Section 200.340. For the depositions to be of any use to Z-Tel/Covad, Z-Tel/Covad would have to be able to use them in their filings in this proceeding. Staff and Intervenor Comments are due *tomorrow*. As noted previously, Z-Tel/Covad ignore this problem by asking that the Comment due date be deferred. However, as noted previously, there is no room in the schedule for a deferral, and Z-Tel/Covad offer no suggestions as to how such a deferral could be squared with the statutory requirements.

Moreover, it would not be reasonable to allow Z-Tel/Covad to take depositions for use in its Reply Comments (as opposed to its Comments). SBC Illinois has only until May 27, 2003 to prepare its Reply Comments, which represents *three* business days. If SBC Illinois were required to spend any (or all) of those three days in depositions, it would severely prejudice the Company's ability to prepare those Reply Comments. Furthermore, SBC Illinois would then have no opportunity to respond to any new arguments or information submitted by Z-Tel/Covad in their Reply Comments, because there is no opportunity for a Surreply. This would be procedurally unfair and contrary to the schedule in this proceeding.

WHEREFORE, in view of the foregoing, Z-Tel Communications, Inc.'s and Covad Communication Company's Emergency Motion for Continuance of Briefing Schedule and Request that SBC Produce Witnesses for Deposition on Less Than 14 Day's Notice should be denied.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

One of Its Attorneys

Louise A. Sunderland
Karl B. Anderson
Illinois Bell Telephone Company
225 West Randolph, Floor 25D
Chicago, Illinois 60606
(312) 727-6705
(312) 727-2928

Theodore A. Livingston
J. Tyson Covey
Mayer Brown Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' OPPOSITION TO Z-TEL/COVAD EMERGENCY MOTION FOR CONTINUANCE OF BRIEFING SCHEDULE AND REQUEST FOR DEPOSITIONS** was served on the following parties by U.S. Mail and/or electronic transmission on May 20, 2003.

Louise A. Sunderland

SERVICE LIST FOR DOCKET 03-0323

Glennon P. Dolan
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 52701
gdolan@icc.state.il.us

Leslie D. Haynes
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601-3104
lhaynes@icc.state.il.us

Mary C. Albert
Allegiance Telecom of Illinois, Inc.
1919 M Street NW, Suite 420
Washington, DC 20036
mary.albert@algx.com

Melia Carter
Covad Communications
227 West Monroe Street, 20th Floor
Chicago, IL 60606
mecarter@covad.com

Randolph R. Clarke, Janice A. Dale,
Susan L. Satter
Illinois Attorney General's Office
100 West Randolph, 11th Floor
Chicago, IL 60601
rclarke@atg.state.il.us
jdale@atg.state.il.us
ssatter@atg.state.il.us

William J. Cobb III
Covad Communications Company
100 Congress Ave., Suite 2000
Austin, TX 78701
bcobb@covad.com

Joseph E. Donovan, Henry T. Kelly
O'Keefe Ashendon Lyons & Ward
30 North LaSalle Street
Chicago, IL 60602
henrykelly@okeefe-law.com
joedonovan@okeefe-law.com

William A. Haas
McLeodUSA
6400 C Street SW, P.O. Box 3177
Cedar Rapids, IA 52406-3177
whaas@mcleodusa.com

Matt C. Deering, Dennis K. Muncy,
Joseph D. Murphy
Meyer Capel
306 West Church St., P.O. Box 6750
Champaign, IL 61826
Mdeering@meyercafel.com
dmuncy@meyercafel.com
jmurphy@meyercafel.com

Carmen Fosco
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601-3104
cfosco@icc.state.il.us

Harry Gildea
Snavelly King Majors O'Connor Lee
1220 L Street NW, Suite 410
Washington, DC 20005
hgildea@snavelly-king.com

Allan Goldenberg, Mark N. Pera
Cook Co. State's Attorney's Office
69 West Washington, Suite 700
Chicago, IL 60602
agolden@cookcountygov.com
mpera@cookcountygov.com

Matthew L. Harvey
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601-3104
mharvey@icc.state.il.us

Richard E. Heatter
MGC Communications, Inc.
3301 North Buffalo Drive
Las Vegas, NV 89129
rheatter@mpowercom.com

Rick Holzmacher
Illinois Independent Telephone Assn
212 Thames River Road
Springfield, IL 62707
rickholzmacher@msn.com

Carol Keith
NuVox Communications, Inc.
16090 Swingley Ridge Rd., Suite 500
Chesterfield, MO 63017
ckeith@nuvox.com

Michael J. Lannon
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601-3104
mlannon@icc.state.il.us

Julie B. Lucas
Citizens Utility Board
208 South LaSalle, Suite 1760
Chicago, IL 60604
julucas@cuboard.org

Owen E. MacBride
Schiff Hardin & Waite
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
omacbride@schiffhardin.com

M. Gavin McCarty
Globalcom, Inc.
333 West Wacker Drive, Suite 1500
Chicago, IL 60606
gmccarty@global-com.com

Frances McComb
Talk America, Inc.
6608 Route 202
New Hope, PA 18938
franci@talk.com

Julie Musselman
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jmusselm@icc.state.il.us

Peter Nyce
Department of the Army
Office of the Judge Advocate General
901 North Stuart Street
Arlington, VA 22203
peter.nyce@hqda.army.mil

Douglas Price
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
dprice@icc.state.il.us

David O. Rudd
Gallatin River Communication
625 South Second Street, Suite 103-D
Springfield, IL 62704
dorudd@aol.com

Kristen M. Smoot
Illinois Consolidated Telephone
121 South 17th Street
Mattoon, IL 61938
kristen.smoot@rcn.net

Mary Stephenson
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601-3104
mstephen@icc.state.il.us

Darrell Townsley
WorldCom
205 North Michigan Ave., Suite 1100
Chicago, IL 60601
darrell.townsley@wcom.com

Ron Walters
Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Tampa, FL 33602
rwalters@z-tel.com